

A Re Teoh Thean Peng, ex p D & C Leasing Sdn Bhd

HIGH COURT (ALOR SETAR) — BANKRUPTCY NO 29-553-92
KC VOHRAH J
6 APRIL 1993

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Civil Procedure — Transfer of proceedings — Application for transfer by way of summons-in-chambers — Whether valid

Bankruptcy — Petition — Validity of creditor's petition — Effect of failure to annex petition to verifying affidavit — Whether proceedings nullified — Bankruptcy Rules 1969 rr 9(1), (3), 106 & Form 11 — Bankruptcy Act 1967 s 6(1)

C

Bankruptcy — Petition — Validity of creditor's petition — Affidavit verifying petition affirmed before presentation of petition — Effect thereof

D

The judgment creditor had presented a creditor's petition against the judgment debtor ('the debtor'). The debtor had opposed the petition of the judgment creditor on three grounds. The debtor contended that:

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(1) the procedure adopted by the judgment creditor to transfer the proceedings from the High Court in Penang to the High Court in Alor Setar was irregular;

(2) the petition represented in the Penang High Court was invalid because the verifying affidavit was not physically attached to the petition as required by the Bankruptcy Rules 1969 ('the Rules'); and

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(3) the petition was invalid since the verifying affidavit was affirmed before the presentation of the petition.

Held, allowing the petition:

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(1) The argument by the debtor that the application for transfer of proceedings from the Penang High Court to the Alor Setar High Court should have been by way of motion was rejected because the debtor should have applied to set aside the order made by the Penang High Court.

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(2) The language in Form 11 read together with s 6(1) of the Bankruptcy Act 1967 ('the Act') and r 106 clearly shows that the petition has to be annexed to the verifying affidavit; the petition must be tied to or affixed to or stapled to the verifying affidavit, so as to avoid dispute as to what exactly is being verified. If the petition is not annexed to the verifying affidavit, that will render the proceedings a nullity.

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(3) The affidavit verifying the petition must be affirmed after the petition has been attested. However, the affirmation of the verifying affidavit shortly before the petition is filed but after it has been duly attested is permissible. In this case, there was no irregularity when the petition accompanied by the verifying affidavit was presented together to the court.

[Bahasa Malaysia summary]**A**

Pemiutang penghakiman telah mengemukakan suatu petisyen pemiutang terhadap penghutang penghakiman ('penghutang itu'). Penghutang itu telah menimbulkan tiga bantahan terhadap petisyen tersebut. Penghutang itu berhujah bahawa:

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- (1) prosedur yang digunakan oleh pemiutang penghakiman untuk memindah prosiding ini dari Mahkamah Tinggi Pulau Pinang ke Mahkamah Tinggi Alor Setar merupakan suatu luar aturan;
- (2) petisyen yang telah dikemukakan di Mahkamah Tinggi Pulau Pinang adalah tidak sah kerana affidavit yang menentusahkan petisyen tersebut tidak dilampirkan secara fizikal kepada petisyen tersebut seperti yang dikehendaki oleh Kaedah-Kaedah Kebankrapan 1969; dan
- (3) petisyen tersebut adalah tidak sah kerana affidavit yang menentusahkan petisyen tersebut telah diikrarkan sebelum petisyen tersebut dikemukakan.

C**D**

Diputuskan, membenarkan petisyen itu:

- (1) Hujahan oleh penghutang penghakiman bahawa permohonan untuk memindah prosiding dari Mahkamah Tinggi Pulau Pinang ke Mahkamah Tinggi Alor Setar sepatutnya dilakukan melalui suatu permohonan usul ditolak kerana penghutang sepatutnya membuat permohonan untuk mengenenpikan perintah yang dibuat oleh Mahkamah Tinggi Pulau Pinang.
- (2) Bahasa yang diperuntukkan di dalam Borang 11 dibaca seraya dengan s 6(1) Akta Kebankrapan 1967 ('Akta itu') dan k 106 menunjukkan dengan jelas bahawa petisyen tersebut mesti dilampirkan dengan affidavit yang menentusahkan petisyen tersebut; petisyen tersebut mesti diikat atau ditampal atau dikokot kepada affidavit yang menentusahkan petisyen tersebut, supaya dapat mengelak sebarang pertikaian mengenai apa sebenarnya yang sedang ditentusahkan. Jika petisyen itu tidak dilampirkan dengan affidavit yang menentusahkan petisyen tersebut, prosiding akan menjadi tidak sah.
- (3) Affidavit yang menentusahkan petisyen itu mesti diikrarkan selepas petisyen itu diakusaksikan. Tetapi, pengesahan affidavit yang menentusahkan petisyen sebaik sebelum petisyen tersebut difailkan tetapi selepas ia diakusaksi, adalah dibenarkan. Di dalam kes ini, tidak terdapat luar aturan apabila petisyen bersama affidavit yang menentusahkan petisyen itu dikemukakan bersama kepada mahkamah.]

E**F****G****H****Cases referred to**

- 1 *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526 (folld)
- 2 *Re Daunt* [1905] 5 SR (NSW) 553 (folld)
- 3 *Re Abrahamson* 22 ALR 749 (folld)
- 4 *Re A Debtor (No 7 of 1910)* [1910] 2 KB 59 (refd)

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- A 5 *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 (not folld)
 6 *Re Shariff Haji Sahari* [1992] 3 CLJ 1775 (not folld)
 7 *Re Ho Weng Keong, ex p Marketlink (M) Sdn Bhd* [1993] 1 MLJ 60 (not folld)
 B 8 *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 (not folld)
 9 *Re Lee Boon Hooi* [1992] 1 AMR 45 214 (folld)

Legislation referred to

- C Bankruptcy Act 1967 s 6(1)
 Bankruptcy Rules 1969 r 9(1), (3), 108, 235, Form 11

Nawal bte Harun @ Abdul Rahman (Gan Teik Chee & Ho) for the judgment creditor.

Yee Teck Fah (Yee Teck Fah & Co) for the judgment debtor.

D *Cur Adv Vult*

KC Vohrah J: I made a receiving order in respect of the judgment debtor and on the application of the official assignee adjudged the debtor bankrupt. I now give my reasons.

- E The judgment debtor had opposed the petition of the judgment creditor on three grounds.

Transfer of proceeding from Penang to Alor Setar High Court irregular?

- F The first ground was that the procedure adopted by the judgment creditor to transfer the proceedings from the High Court in Penang to the High Court in Alor Setar was irregular.

- G There was an application by way of summons-in-chambers before the judge in the High Court in Penang for such transfer and the order was duly made transferring the case. The judgment debtor argued that the application should have been by way of motion as provided by r 18 of the Bankruptcy Rules 1969 ('the Rules'). If that was his complaint, then he should have applied to set aside the order made by the High Court in Penang. As far as I was concerned, the proceedings were properly before me as there was before me an existing order of the High Court in Penang transferring the case to the High Court in Alor Setar.

- H *Background*

- I The other two grounds relate to the petition and the affidavit verifying the petition; that the petition presented on 3 June 1991 in High Court Penang was invalid because, firstly, the affidavit was not physically attached to the petition as required by the Rules and, secondly, the verifying affidavit was affirmed before the presentation of the petition.

Section 6 of the Bankruptcy Act 1967 ('the Act') requires that a creditor's petition shall be verified by affidavit of the creditor or of some other person on his behalf having knowledge of the fact. In this case, the credi-

tor's petition was dated 30 May 1991 and signed by the branch manager of the petitioner on 30 May 1991 and that was attested (ie the signing was witnessed), as required by rr 99 and 102 and Form 9, by an advocate and solicitor. The affidavit verifying the statements in the petition was affirmed one day later, ie on 31 May 1991. From a check with the court records, it would appear that the verifying affidavit and the petition were presented in High Court II in Penang on 3 June 1991. The petition was not annexed to the verifying affidavit in the sense of the petition being joined by physical means to the affidavit.

Must petition be physically joined to the verifying affidavit?

As regards the issue whether the petition must be physically joined to the verifying affidavit, with respect, I agree with the view of Edgar Joseph Jr J (as he then was) in *Ooi Thean Chuan v Banque Nationale de Paris*¹ that for the presentation of the petition, the petition has to be annexed to the verifying affidavit. The language used in Form 11 in the Rules is clear. The relevant words are 'I, the petitioner named in the petition hereunto annexed affirm ...' and these words read with s 6(1) of the Act and r 106 show as explained in *Ooi Thean Chuan*¹ at p 534 that 'the petition must be tied to ... or affixed to or stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified'.

Does failure to annex petition to verifying affidavit render proceedings a nullity?

The next question is — what is the effect of the failure to annex the petition to the verifying affidavit? Edgar Joseph Jr J considered, inter alia, *Re Daunt*² and *Re Abrahamson*³ both Australian cases, and came to the conclusion that the failure to annex a copy of the petition to the verifying affidavit 'goes beyond a mere irregularity and amount to something that renders the proceedings a nullity thereby sweeping away the jurisdiction of the court'. His Lordship added, 'That being the case, the fact that no substantial injustice or no prejudice had been suffered by the debtor is beside the point and s 131 of the Bankruptcy Act is without application'.

The principal case relied upon in *Ooi Thean Chuan*¹ was *Re Abrahamson*³ where Neasey J explained why it was necessary to annex a copy of the petition to the affidavit. In that case, the petition was not annexed to the affidavit and Neasey J said (and I quote the passage from *Ooi Thean Chuan*¹ at p 536):

The verifying clause merely refers to 'the said petition' and there is no specific petition referred to in the body of the affidavit. Verification of the creditor's petition is not an inconsequential matter. For example, s 52(1)(a) provides that at the hearing of a creditor's petition the court shall require proof of the matters stated in the petition, but for that purpose may accept the affidavit verifying the petition as sufficient — and see *MacDonald, Henry & Meek's Australian Bankruptcy Law & Practice* (5th Ed) notes to para 2021. The correct and, in my view, the only satisfactory way to verify the contents of any document is to annex a copy of it to the affidavit, as is commonly done with affidavits of service and the like, and as the recommended form B4 on p 682 of *McDonald, Henry & Meek*

A sets out. The relevant affidavit in this case does not fulfil the statutory requirement of s 47(1)(b), and the failure to do so is not a mere formal defect or irregularity.

B I do not know about the nature of the Australian rules on bankruptcy, but in Malaysia, r 9(1) provides that every proceeding in a bankruptcy matter shall be dated and shall with necessary additions be intitled as in Form 1 and r 9(3) states that the first proceeding in every matter shall have a distinctive number assigned to it in the office of the registrar and all subsequent proceedings in the matter shall bear the same number as the first proceeding. Under r 235, the registrar shall keep a register of bankruptcy notices, a register of petitions and shall make entries in the register forthwith after the step in the proceedings to which they relate.

C Form 11 (relating to the verifying affidavit requires the title to be inserted, ie the title as shown in Form 1, and the distinctive number assigned to the first proceeding would certainly appear with the title in the verifying affidavit. In the instant case, the distinctive number appears in the title of the verifying affidavit. Then again, in practice, before a petition is registered in the register of petitions under s 235, there will be a check to see if there is an accompanying verifying affidavit; if there is none, no registration is made in the register. It is the title and distinctive number assigned to the first proceeding which identifies both the petition and the verifying affidavit. In the instant case, the register does show the petition having been registered and clearly, the registrar would have had to refer to the verifying affidavit under r 108 to investigate the statements in the petition (see *Re A Debtor (No 7 of 1910)*⁴ to which I shall make reference again later) before sealing the copies of the petition for service.

The provision reads:

F After the presentation of the creditor's petition and before sealing the copies of the petition for service the statements in the petition shall be investigated by the Registrar and where some of the statements in the petition cannot be verified by affidavit witnesses may be summoned to prove the same.

G The registrar then under r 115 appoints the time and place at which the petition will be heard and notice thereof is then written on the petition and sealed copies.

H It will be noticed, as has been stated, that the verifying affidavit has the same distinctive number assigned to the first proceeding and that before the registrar seals copies of the petition, he must have first investigated the truth of the statements in the petition under r 108 through the verifying affidavit. Once the copies of the petition have been sealed and time of hearing appointed, it means that in effect, the registrar has given leave to the petitioner to file the petition based on the verifying affidavit or evidence of witnesses. The registrar would *resort* to witnesses only if the affidavit is *different*. In *Re A Debtor*⁴ referred to earlier, Vaughan Williams LJ in commenting on the verifying affidavit required by the English Bankruptcy Rules 1886–1890 stated:

I There has been an affidavit filed ... but it is an affidavit which in effect is an affidavit for the purpose of getting leave to file the petition in bankruptcy. It is not so called, but that it is so in substance is quite *plain*.

Thus once copies of a petition are found sealed, it follows that a verifying affidavit had been filed in respect of the petition and the registrar being duty bound so to do or had investigated the petition using the verifying affidavit to do that.

Neasey J in *Re Abrahamson*³ referred to s 52(1)(a) of the Australian Bankruptcy Act and stated that it 'provides that at the hearing of a creditor's petition the court shall require proof of the matters stated on the petition but for that purpose may accept the affidavit verifying the petition as sufficient'.

That was, however, not in the position in England in relation to the English Bankruptcy Act 1952 (now replaced by the Insolvency Act 1986) and the Bankruptcy Rules 1952 ('BR') (now replaced by the Insolvency Rules 1986) (our Act and Rules were substantially modelled on the 1952 Act and Rules) as can be seen from this passage from *Williams and Muir Hunter on Bankruptcy* (19th Ed) p 56:

... A petitioning creditor who has obtained, under BR169, an order dispensing with his attendance at the hearing, must still prove the statements in his petition if the debtor gives notice of his intention to dispute them. *Re A Debtor* (1 of 1916) [1916] HBR 54. An affidavit of debt should normally be sworn within 24 hours before the first hearing; but if no notice to dispute is given, an admission of the debt may be sufficient proof. (*Re A Debtor* (27 of 1943) [1943] Ch 210.)

The petitioning creditor may call for the production of the debtor's books, and call the debtor himself as a witness to prove the allegations in the petition, (*Re XY*) [1902] 1 KB 98, but the he cannot have discovery before the hearing. The affidavit of verification (F12) on which the petition is filed cannot be used upon the hearing of the bankruptcy petition. (*Re A Debtor* (7 of 1910) [1910] 2 KB 59, 62.)

In the above passage, there is reference to BR169 and F12. The Malaysian provisions corresponding substantially to BR169 and F12 are r 122 and Form 11, respectively, and what one needs to note is that the affidavit of verification on which the petition is filed cannot be used upon the hearing of the bankruptcy petition and this principle was made clear as shown in the above passage by the case cited therein — *Re A Debtor* (7 of 1910).⁴ At p 62 of the case, Vaughan Williams LJ after stating (I had earlier adverted to this) that the affidavit is in effect for the purpose of getting leave to file the petition in bankruptcy continued: 'The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition.'

I think if it is established that a petition, bearing the title and distinctive number assigned to the first proceeding in the bankruptcy matter as provided for under r 9, was dated, signed and affirmed before the accompanying verifying affidavit was affirmed, (I shall be coming to this latter aspect later) and the verifying affidavit bears the same title and distinctive number as the said petition (as in this case), then the proceedings are not rendered a nullity even if the said petition is not annexed to the said affidavit. This is so because the verifying affidavit which has the same title and distinctive number as the petition, and this is a statutory requirement, does indeed verify the statements in the petition with sufficient particularity as in the present case. Then again, since a verifying affidavit serves a limited purpose of enabling the registrar to investigate the petition, and that only, in order

- A for him to decide whether to seal copies of the petition for service once it is established that the copies were sealed for service (as in this case) it is clear that the registrar adverted to verifying affidavit for investigation under r 108 and that that affidavit must have borne (as in this case) the title and distinctive number and borne by the petition itself unless the contrary can be shown. For these reasons, and with the greatest of reluctance, I have to say that it is difficult for me to follow an otherwise compelling view that if the petition is not annexed to the verifying affidavit, the proceedings are a nullity.

C *Must petition be presented before verifying affidavit is affirmed?*

- D Counsel for the judgment debtor argued that the petition must be presented before the verifying affidavit is affirmed. To elaborate, it was argued that since the affidavit was sworn on 31 May 1991, well before the presentation of the petition which was on 3 June 1991 (although it was dated, signed and attested on 30 May 1991) it meant that that was a flaw in the proceedings and that the flaw vitiated the creditor's petition. Counsel for the judgment debtor relied on *Sobri bin Arshad v Associated Tractors Sdn Bhd*⁵ and *Ooi Thean Chuan*¹ and also *Re Shariff Haji Sahari*⁶ (where Zakaria Yatim J followed *Sobri*⁵) for this view. Against this objection, counsel for the judgment creditor cited the contrary decision in *Re Ho Weng Keong, ex p Marketlink Sdn Bhd*⁷ (decided by Lamin J) and *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd*⁸ (decided by VC George J) where the view in *Sobri*⁵ was considered and not followed. In *Re Mohd Sharif*⁸ VC George J was of the view that in bankruptcy proceedings no time frame is prescribed in the Act or the Rules for the swearing and filing of the affidavit verifying the bankruptcy petition.

- F Lamin J in *Re Ho Weng Keong*⁷ who, it appears from his judgment, was not aware of the decision in *Re Mohd Sharif bin Sapie*,⁸ arrived at the same view as VC George J that neither the Act nor the rules specifically state that a verifying affidavit must be affirmed after the filing or presentation of the petition.

- G With this judicial imbroglio, the view of Mahadev Shankar J in *Re Lee Boon Hooi*⁹ bears looking into. His Lordship considered *Sobri*⁵ but it appears his Lordship was then unaware of the cases decided by VC George J and Lamin J.

- H Mahadev Shankar J was of the view, *firstly*, that the affidavit verifying the petition must be affirmed *after* the petition has been attested. Thus, he eschews the inference that can be drawn from the views of VC George J and Lamin J that since neither the Act nor the Rules specify the time when their affidavit can be affirmed, the affidavit can be even affirmed before the petition is attested. *Secondly*, he was of the view that affirmation of the verifying affidavit shortly before the petition is filed but after it has been duly attested is permissible. I respectfully agree with those views. This is what he said at p 218:

Sobri bin Arshad [1991] 3 MLJ 32 dealt specifically with a bankruptcy petition. The crux of this judgment is that since a bankruptcy petition has no legal existence until it is presented it can only be affirmed thereafter. I do not agree.

With the greatest respect I would draw the kind attention of all concerned to rr 101 and 102 of the Bankruptcy Rules. Remembering that the court file would already have been opened when the request for the bankruptcy notice was made, these rules clearly envisage the coming into being of the petition as soon as it is ready for attestation as required by r 102. In the context of this rule that means it must be witnessed. This is usually done by the petitioning creditors' solicitor. It is this act of attestation which completes the petition and makes it a creditor's petition ready for presentation under the Act after it has been duly affirmed.

The sequence of events provided by the Rules makes it imperative for the affidavit verifying the petition to be affirmed *after* the petition has been attested, and not as in a winding-up only after it has been presented.

I am firmly of the view that the affirmation of this affidavit shortly before the petition is filed but after it has been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense because all the required documents can be filed simultaneously and thereafter taken at one go by the registry.

His Lordship continued, drawing attention to r 108 which I had adverted to earlier in relation to *Re A Debtor (7 of 1910)*⁴ when discussing the limited use of the verifying affidavit:

In this context it may be worth bearing in mind that all the conditions to be fulfilled as provided by s 5(1)(a)–(d) of the Act relate to facts which are antecedent to the attestation of the petition and its consequent affirmation. *After it has been presented (ie filed) r 108 provides that it cannot be sealed for service until it has been investigated by the registrar. Theoretically the registrar should do this immediately after the petition is presented so the affidavit verifying the petition should accompany it.* To interpose an additional burden upon the judgment creditor requiring him to attend court after presentation and file the verification affidavit, before investigation will add to costs and expense which does not serve any useful purpose. (Emphasis added.)

One other aspect. If one accepts that the petition must be dated, signed and attested before the verifying affidavit is affirmed and one also accepts that the petition must be annexed to the verifying affidavit then it seems to one that when the petition is presented to the court, the verifying affidavit to which it is annexed must perforce have been affirmed when it is presented simultaneously with the petition in court. Thus, in my view, there was no irregularity when the petition (signed and attested on 30 May 1991) accompanied by the verifying affidavit (affirmed on 31 May 1991) was presented together to the court on 3 June 1991.

I therefore allowed the petition of the judgment creditor and made a receiving order in respect of the judgment debtor and on the application of the official assignee I adjudged the debtor bankrupt.

Order accordingly

Reported by Lim Chee Wee